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IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 2901

DOROTHY NIPPERT,

Petitioner,

vs.

CITY OF RICHMOND,

Respondent

STATEMENT AS TO JURISDICTION

Statement of the Case

The appellant, Dorothy Nippert, was employed as a solicitor for the American Garment Company, which is owned and operated by John V. Rosser, and has its place of business at 3617 12th Street Northeast, Washington, D. C., and she traveled from city to city and state to state taking orders for a ladies' garment, which was manufactured by the American Garment Company. A down payment was required from the purchaser and the order was then forwarded to the American Garment Company in Washington, D. C., and the order filled and forwarded to the purchaser by mail C.O.D., the solicitor at no time making a delivery of the article.

The appellant on January 20, 1944, was soliciting orders in the City of Richmond for the American Garment Company, and on that day was arrested and charged with

"unlawfully engaging in the City of Richmond in the business of a solicitor without having procured a City license which was assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937".

The appellant was arraigned and pleaded "Not Guilty" to the charge, and in the Police Court of the City of Richmond relied upon the defense that she was soliciting orders in interstate commerce, and that the ordinance of the City of Richmond, insofar as it referred to the appellant, was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution.

The appellant was found guilty as charged and fined Twenty-Five Dollars ($25.00) and costs and ordered to purchase a City license, as provided by Section 23, Chapter 10 of the Richmond City Code of 1937.

An appeal was noted from the judgment of the Police Court to the Hustings Court of the City of Richmond, where a trial de novo was had, and the same question and defense was presented to that Court, and the appellant was found guilty of a violation of the ordinance requiring her to obtain a license, and was fined Five Dollars ($5.00).

The following is an agreed statement of the facts as found by the Hustings Court:

> "The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C.O.D. for the balance

to the purchaser. The solicitors at no time make a delivery of the article.

The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not therefore procured a City revenue license from the City of Richmond."

A petition for a writ of error to the Hustings Court of the City of Richmond was filed in the Supreme Court of Appeals of Virginia, in which, among other errors, it was assigned that the Court had erred in refusing to hold that the ordinance of the City of Richmond, insofar as it referred to appellant, was in conflict with the commerce clause of the Federal Constitution. The Supreme Court of Appeals of the State of Virginia allowed a writ of error, and, in an opinion, which is attached hereto as Exhibit One, covering the error assigned—that the ordinance, insofar as it referred to the appellant, was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution—affirmed the

decision of the Hustings Court, expressly passing upon the Federal question and sustaining the validity of the City ordinance, as against the appellant's contention that it violated her constitutional rights.

Opinion Below

The proceedings before the Police Court of the City of Richmond and the Hustings Court of the City of Richmond were oral and no opinions were filed in either case, but the opinion of the Supreme Court of Appeals of Virginia is reported as *Nippert* v. *The City of Richmond,* 183 Virginia, 689, a copy of which opinion is attached hereto as Exhibit One.

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., secs. 344 (a), 861a).

Statute of the State Involved

The ordinance of the City of Richmond, the validity of which is involved, is Chapter 10, Section 23 of the Richmond City Code of 1937, which is as follows:

> "Chapter 10, Section 23—Agents—Solicitors— Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)"

Date of Judgment and of Application for Appeal

The opinion and judgment of the Supreme Court of Appeals of the State of Virginia was rendered on March 5, 1945, and is reported as "*Nippert* v. *The City of Richmond,*

183 Virginia, 689, a copy of which is appended hereto as Exhibit One. The application for appeal was presented April 23, 1945.

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of this Court are:

King Mfg. Co. v. *Augusta*, 277 U. S. 100, 114;
Crenshaw v. *Arkansas*, 227 U. S. 389, 395;
Robbins v. *Shelby County Taxing District*, 120 U. S., 489, 497, 498;
Real Silk Hosiery Mills Inc. v. *City of Portland*, 268 U. S. 325;
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55.
Murdock v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 110.

Raising the Federal Questions

The proceedings in the Police Court and in the Hustings Court of the City of Richmond were very informal, and the constitutional question—that the ordinance of the City of Richmond which required that the appellant obtain a permit from the Director of Public Safety before obtaining a license, and the obtaining of a license in order to solicit orders in interstate commerce, violated the appellant's constitutional rights under Article 1, Section 8, Clause 3 of the United States Constitution, was presented and passed upon orally by the Court.

In appellant's petition to the Supreme Court of Appeals for a writ of error there was assigned the following assignment of errors:

> "1. The Court erred in holding that the City had the authority to pass the ordinance in question.

2. The Court erred in refusing to hold that the ordinance, insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution.

3. The Court erred in holding that petitioner had violated the law in soliciting orders in interstate commerce without having procured a city license as a solicitor."

The Supreme Court of Appeals of Virginia, in its opinion, attached here as Exhibit One, expressly passed upon the contention of the appellant—that the requirements of the ordinance of the City of Richmond requiring that she obtain a license in order to solicit orders in interstate commerce were unconstitutional, and sustained the ordinance as against its claimed invalidity under the commerce clause of the Federal Constitution.

Statement of the Grounds upon Which It Is Contended the Questions Involved Are Substantial

1. The decision and judgment of the Supreme Court of Appeals of Virginia, sustaining the validity of the ordinance of the City of Richmond, which required the appellant to obtain a permit from the Director of Public Safety and to obtain a license before she would be permitted to solicit orders in interstate commerce, overrules, and is in direct conflict with, every case which has been decided by the Supreme Court of the United States on this specific point.

2. The facts in this case bring it clearly within the case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, 498, and duplicate the facts as presented in the case of *Real Silk Hosiery Mills Inc.* v. *City of Portland*, 268 U. S. 325.

3. The decision of the Supreme Court of Appeals of Virginia expressly permits the City of Richmond to require of the appellant that she obtain a permit from the Director of Safety of the City of Richmond before applying for a license to solicit, and also required her to pay $50.00 for a license in order to solicit orders for goods to be shipped in interstate commerce. To permit the City of Richmond to place in the hands of any officer of that City the power to pass upon whether a permit should be issued to any individual for the purpose of obtaining a license, would, in effect, give to that officer the power to control or suppress the privilege of even obtaining the license to solicit for the sale of goods in interstate commerce. *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 110.

4. The license tax required by the City of Richmond from the appellant prior to her being permitted to solicit in interstate commerce is a flat license tax, and is violative of her constitutional rights under the Constitution to solicit for the sale of goods in interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, 498; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 55.

5. The appellant's livelihood depends upon her right under the United States Constitution to solicit orders for the sale of goods in interstate commerce, and if she were to be required to submit to the whims of any person in authority as to whether or not she might obtain a permit in order to obtain the license to continue her business as a solicitor and also to pay a flat tax for the privilege of soliciting for orders in interstate commerce, that person could very readily, by reason of his requirements, prevent appellant from continuing her business.

Conclusion

It is respectfully submitted that this Court has jurisdiction of the appeal.

Dated: April 23, 1945.

Respectfully submitted,

CORNELIUS H. DOHERTY,
STANLEY H. KAMEROW,
Attorneys for Appellant.

EXHIBIT NUMBER ONE

Present: Campbell, C. J., Holt, Hudgins, Browning, Eggleston and Spratley, JJ.

Record No. 2901

DOROTHY NIPPERT

v.

CITY OF RICHMOND

OPINION BY CHIEF JUSTICE PRESTON W. CAMPBELL

Richmond, Virginia, March 5, 1945.

From the Hustings Court of the City of Richmond, John H. Ingram, Judge

The litigants agree that in the case at bar the principal question is whether the ordinance of the city of Richmond, under which the defendant, Dorothy Nippert, was convicted, is violative of the Federal Constitution. That ordinance reads:

"*Chapter 10, Section 23.*—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)"

The defendant was arraigned in the Hustings Court of the City of Richmond upon a warrant emanating from the police justice's court, which charged "that on the 20th day of January, 1944, at said city of Richmond Dorothy Nippert did unlawfully engage in Richmond in a business of a solicitor without having procured a city license assessable under section 23 of chapter 10 of the Richmond City Code of 1937."

Defendant, upon her arraignment, pleaded not guilty, and with her consent and the concurrence of the city attor-

ney, the court proceeded to hear and determine the case without a jury. At the conclusion of the evidence, the court found the defendant guilty as charged in the warrant and assessed her fine at five dollars.

The facts certified by the trial judge are as follows:

"The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N.E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from city to city throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C.O.D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

"The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

"The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy

Nippert, had not *therefore* procured a City revenue license from the city of Richmond."

The dominant assignment of error is:

"The Court erred in refusing to hold that the ordinance, insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution."

Article 1, section 8, clause 3, of the United States Constitution reads:

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

Counsel for defendant rely upon *Robbins* v. *Shelby County*, 120 U. S. 489, 7 S. Ct. 592, to sustain the contention that the ordinance is violative of the commerce clause, *supra*. That case involved a tax upon a "drummer" or "traveling salesman" which is clearly distinguishable from the case at bar wherein the *gravamen* of defendant's offense was her "doing business" in the city of Richmond without first having procured the required license. It is not controverted that the defendant worked four days selling merchandise to the clerks of two large retail stores in the city of Richmond.

That the distinction between "mere solicitation" and "doing business" is more ethereal than real is, we think, exemplified in the expression of Mr. Justice Rutledge in his dissent in *McLeod* v. *Dilworth Co.*, 64 Sup. Ct., 1030, 1033: "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous, and persistent, is fast losing its force."

It is beyond dispute that both the initial and the ultimate burden of the tax imposed in the case at bar is the same and rests upon the defendant—the solicitor—who is an independent agent within the taxing jurisdiction, and upon her independent acts of soliciting which transpired in the city, and does not in the least rest upon the garment company which is outside of the State.

Since the decision of the Supreme Court in *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 60 Sup. Ct. 388, the

former views as to the freedom of interstate commerce from local taxation have been greatly modified.

Following the doctrine announced in that case, this court, in *Dunston* v. *City of Norfolk*, 177 Va. 689, 15 S. E. (2d) 86, held that the States have a right to require interstate commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the commerce or increase the cost of business.

Mr. Justice Spratley, in his analysis of the Berwind-White decision, clearly draws the distinction between that case and *Robbins* v. *Shelby County, supra.* In this opinion this is said:

"The defendant relies on the often cited case of *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, decided in 1887, and the decisions in line with it. There it was held that the State taxation upon interstate commerce or upon the privilege of engaging in it was a burden, and consequently violative of the purpose of the commerce clause. A vigorous dissent by Mr. Chief Justice Waite, joined in by Mr. Justice Field and Mr. Justice Gray, asserted the principle that the validity of a state tax depended upon the question whether it was discriminatory against citizens of one State in favor of those of another.

"In recent years, there has been a gradual relaxation and modification of the strict and narrow interpretation applied in the above case as to the purpose of the commerce clause. The decisions in many of the later cases are predicated upon the presence or absence of discrimination.

"Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce.

"Under the principles at present applied, the test of the validity of a State taxing law is whether it may, in its practical operation, be made an instrument for impeding or destroying interstate commerce or placing it at a disadvantage in competition with intrastate business."

In our opinion, the decision of the case at bar must rest upon the decision in the *Dunston case, supra*, and therefore, the judgment of the trial court is affirmed.

Affirmed.

(8310)